In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 57

ALBERT FEIGENBAUM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Rehearing

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To the Hon. Fred M. Vinson, Chief Justice of the United States, and to the Hon. Associate Justices of the Supreme Court of the United States:

Comes now Albert Feigenbaum, petitioner above named and respectfully requests that the court grant a re-hearing of the above cause after decision rendered on December 22, 1947.

In support of this petition for re-hearing, petitioner advances the following grounds:

1. That under the rule announced in *Kotteakas v. United States*, 328 U.S. 750, the guilt or innocence of the petitioner Feigenbaum is a personal matter and must be determined separately from the same question as applied to his co-defendant. This court has failed to apply such rule and has considered Feigenbaum's guilt or innocence together with that of his co-defendants, thus applying evidence to Feigenbaum which was incompetent and inadmissible as to him;

2. That the decision of this court draws inferences from the evidence adverse to Feigenbaum where such evidence is susceptible of innocent inferences, contrary to the decisions which hold that a conviction can only be upheld where the facts are inconsistent with any reasonable theory or hypothesis of innocence;

3. That the decision of this court resorts to evidence, heretofore held by this court to be incompetent for such purpose, for the purpose of establishing the conspiracy charged and Feigenbaum's connection therewith;

4. That in holding the evidence sufficient to establish the guilt of Feigenbaum, this court has resorted to evidence which had been excluded as to Feigenbaum in the trial court.

5. That the decision of this court while noting, has failed to pass upon important questions of law raised by Feigenbaum.

THE ONLY EVIDENCE DIRECTLY RELATING TO ALBERT FEIGENBAUM

The only evidence in the case directly connected with petitioner Feigenbaum is that he was the operator of a drug store in San Francisco; that he purchased from the Francisco Distributing Company, 100 cases of liquor for himself, and 100 cases of liquor for Messrs. Taylor & Humes; that Feigenbaum charged Taylor & Humes $6400 for the 100 cases of liquor; that the Francisco Distributing Company was paid for the 200 cases of liquor—100 bought for Feigenbaum—100 sold to Taylor & Humes—at $24.50 a case. Mr. Taylor further testified that on another occasion he bought a case of whisky from Feigenbaum for $64.00 which was delivered to him at Feigenbaum's store at the time of the transaction (R. 329).

In addition to the foregoing, the only other evidence in the case pertaining to Feigenbaum is that the 100 cases were delivered to Taylor & Humes; that the Francisco received a check at $24.50 a case for the 200 cases—100 to Feigenbaum, 100 to Taylor & Humes—and that Taylor & Humes received an invoice from Francisco for 100 cases at $24.50 a case.

There is no other evidence in the case showing that Feigenbaum had any other dealings with Francisco except as above set forth.

There is no evidence establishing how or in what manner Feigenbaum placed the order for the whisky with Francisco, or that Feigenbaum knew Goldsmith, Blumenthal, Weiss or Abel, or had any knowledge of any other sales of the whisky being conducted by any of the last named persons.

This court correctly held that the admissions of Goldsmith and Weiss were not to be considered in determining the guilt of Feigenbaum and the trial court was meticulous in excluding such evidence as to him.

Likewise, the question of an unknown owner of the whisky is not involved in the Feigenbaum case. The only evidence is that Feigenbaum purchased the whisky from the Francisco Company, both for himself and for Taylor and Humes. The only inference that can be drawn in this regard is that the Francisco Company was the owner of the whisky.

Lastly, there is no evidence that Francisco ever received from the Feigenbaum transactions, any sum in excess of $24.50 per case.

Standing alone the record as above summarized is wholly insufficient to establish Feigenbaum's connection with the general conspiracy charged in the indictment.

It is only by resorting to unwarranted inferences and to evidence incompetent for such purpose, that a structure of general conspiracy can be erected involving Feigenbaum.

THE DECISION OF THIS COURT RESORTS TO EVIDENCE, FOR THE PURPOSE OF ESTABLISHING THE CONSPIRACY CHARGED, WHICH EVIDENCE IS INCOMPETENT FOR SUCH PURPOSE ACCORDING TO THE PRIOR DECISIONS OF THIS COURT.

It has been the invariable rule of evidence and decision in the Federal Courts that *neither the conspiracy charged nor a defendant's connection therewith can be established by the acts and declarations of a co-conspirator done or said out of the defendant's presence.* Phrased differently

the rule is: that the conspiracy and defendant's connection therewith must be established by proof *aliunde* the acts and declarations of a co-conspirator.

In *Glasser v. United States*, 315 U.S. 60, this court states the rule as follows:

> "However, such declarations are admissible over the objections of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. Minner v. United States (C.C.A. 10th) 57 F. (2d) 506; and see Nudd v. Burrows, 91 U.S. 426, 23 L.ed. 286. Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence."

In *Minner v. United States*, cited in the *Glasser* case, supra, it is stated; at page 511;

> "The existence of the conspiracy cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirators done or made in his absence."

The rule as stated in the *Glasser* and *Minner* cases, supra, has been announced together with many supporting cases in the cases of *Thomas v. United States* (C.C.A.-10), 57 F.(2d) 1039, 1042; *Dolan v. United States* (C.C.A.-9), 123 Fed. 52, 54; *Nibbelink v. United States* (C.C.A.-6), 66 F.(2d) 178; *U. S. v. Renda* (C.C.A.-2), 56 F.(2d) 601.

This court has resorted to seven individual transactions, involving the whisky,[1] to each of which transactions

1. Sale to Norman Reinberg and Giometti by Abel; sale to Figone by unidentified salesman; sale to Cernuseo by unidentified man; sale to Vogel by unidentified man; sale to Duffy by unidentified man; sale to Lombardi by Blumenthal; sale to Fingerhut and Travis by Blumenthal.

Feigenbaum strenuously objected in the trial court, on the authority of the foregoing cases.

In footnote 14 to this court's decision, there is set forth the evidence held sufficient to establish the conspiracy as to Feigenbaum. Summarized, the evidence in such footnote is as follows.

(1) That prior to the arrival of the first carload of whisky in San Francisco, Blumenthal, Abel and other unidentified salesmen made it known to various people that they could obtain whisky for tavernkeepers; (2) that on the 3rd or 4th of December, Blumenthal told tavernkeeper Fingerhut that the whisky would arrive in the latter part of March; (3) that late in December, Fingerhut received a telephone call, which he said was from Blumenthal, asking whether he needed more whisky and, as a result, Fingerhut made an additional purchase on January 3rd or 4th, 1944; (4) that all of the salesmen followed a singularly set pattern in making their respective sales; (5) that tavernkeeper Reinburg on two occasions, at Abel's direction, drove Abel to San Francisco, dropped him at the Sportatorium, Blumenthal's place of business, and picked him up there a half hour later.

All of the foregoing matters, plus the individual sales made to the tavernkeepers, constituted acts and declarations of alleged co-conspirators done and made out of Feigenbaum's presence and of which he had no knowledge. Under the rules of law and evidence announced by this court and followed in the various circuits, such evidence is incompetent to establish the conspiracy or Feigenbaum's connection therewith, insofar as Feigenbaum is concerned.

It will be noted that the foregoing presents a question different from the one with which this court was mainly concerned, to wit: whether there was a set of separate conspiracies or one general conspiracy as charged. From the trial court through the Circuit Court of Appeals and in this Court, petitioner has contended that there was no competent evidence against him to establish any conspiracy, let alone the one charged in the indictment and that the trial court erred in admitting evidence of the independent transactions of the alleged salesmen as evidence against Feigenbaum. Petitioner further contended that the trial court erred in not instructing the jury that they could not consider the acts and declarations of alleged co-conspirators, said or done out of Feigenbaum's presence, as evidence until the conspiracy and Feigenbaum's connection therewith had been established by evidence *aliunde*. These matters, while properly raised, throughout the record, have not been decided by this court which, in fact, has used such incompetent evidence for the purpose of establishing the conspiracy.

THE CULPABILITY OF FEIGENBAUM DEPENDS ON THE CULPABILITY OF GOLDSMITH. THE EVIDENCE ADMITTED AGAINST FEIGENBAUM FAILS TO ESTABLISH GOLDSMITH'S CULPABILITY.

The decision of this court practically concedes that, in the absence of the so-called admissions made by Goldsmith and Weiss to Harkins, there is no evidence to establish that Goldsmith was doing anything unlawful.

This evidence of the admissions of Goldsmith and Weiss was excluded as evidence against Feigenbaum in the trial

court. However, this court in discussing the culpability of Feigenbaum assumes the culpability of Goldsmith, thus using as evidence against Feigenbaum evidence that had been excluded as to him.

Feigenbaum's guilt can only be determined from the evidence admitted against him and as if he were the only one on trial. Delete the admissions of Goldsmith and Weiss and the activities of Goldsmith appear perfectly lawful and proper. If Goldsmith was not the center of the conspiracy from which the individual spokes radiated, then there is no connection between the activities of the other salesmen and Feigenbaum.

We submit that in holding the evidence to be sufficient to establish Feigenbaum's guilt, this court has overlooked the foregoing matter and that a reconsideration thereof will lead to an entirely different conclusion than the one arrived at.

THE COURT, CONTRARY TO PERTINENT DECISIONS ON THE SUBJECT, HAS INDULGED IN UNWARRANTED INFERENCES TO ESTABLISH THE CULPABILITY OF FEIGENBAUM.

It has always been the writer's understanding that no conviction can be upheld where inferences from the evidence are entirely consistent with innocence even though an inference of guilt could be drawn therefrom. The rule in this regard has been ofttimes announced, some of the later decisions being set forth in the footnote.[2]

An analysis of the decision of this court discloses that practically all of the inculpatory inferences drawn are directly contrary to the foregoing rule.

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2. *Ridenour v. United States*, 14 Fed.(2d) 888, 892;
Kennedy v. United States, 44 Fed.(2d) 131;
Ferris v. United States, C.C.A. 9, 40 Fed.(2d) 836, 840.

Again referring to footnote 14 of this court's decision, it is stated that the inference was justified that Blumenthal, Feigenbaum and the other salesmen were aware that their individual sales were part of a larger common enterprise dependent on the arrangement to give the sales the guise of legitimacy.

In our opinion, the evidence in the case does not warrant such an inference. Nevertheless, such evidence is susceptible of an inference consistent with innocence. Feigenbaum made but one sale of the liquor, he having purchased 100 cases for himself and procured 100 cases for Taylor & Humes. The sale to Taylor & Humes can logically be accounted for as a mere independent act on the part of Feigenbaum by which he sought to make a profit for himself.

This court further states that Feigenbaum knew that there was a carload of whisky involved and that it was a reasonable inference that he knew that other salesmen were making sales similar to his. Would it not be a more reasonable inference to draw from the knowledge of a carload of whisky that other people were making sales, not as Feigenbaum was making one to Taylor & Humes, but as the salesman was making to Feigenbaum? In other words, the only knowledge that can be attributed to Feigenbaum is that he knew Francisco was making sales of whisky to Feigenbaum and to others. That others were in effect reselling the whisky, as Feigenbaum did to Taylor & Humes, and that Feigenbaum knew thereof is a mere matter of conjecture.

This court states that there are compelling indications that all of the salesmen were kept informed of the status

of the whisky. From this, the court infers that such knowledge was part of a general plan to sell the whisky above the ceiling price. A more logical inference can be drawn from the evidence. Feigenbaum was a purchaser of the whisky besides being a seller. As a purchaser he was interested in knowing when he would receive delivery. The fact that others were so interested can not be imputed as a matter of knowledge to Feigenbaum.

This court further states that as all the salesmen had told their prospective customers that he would receive Francisco's invoice for the whisky, that this warranted the inference of a general unlawful scheme. The statement made by Feigenbaum to Taylor & Humes in this regard can be accounted for both logically and innocently. As Feigenbaum placed the order with Francisco in the name of Taylor & Humes, the invoice would issue in the latter names. There is no evidence to show that Feigenbaum knew that anyone else was making such representation.

The decision states that the essence of the unlawful scheme was to sell the whisky illegally in the guise of lawful sales "to the knowledge of each defendant." This inference can be overthrown by one consistent with innocence. Feigenbaum had no knowledge of the activities of Abel, Blumenthal or the unidentified salesmen. Feigenbaum's scheme, if such it can be called, was merely to sell a portion of 200 cases of whisky, which he was able to procure from Francisco, to Taylor & Humes. This constituted an independent, isolated transaction on the part of Feigenbaum, not connected with any activities of others.

This court infers that the plan was one whereby Francisco had in effect made it known that others could procure

whisky from Francisco and resell at a profit, using Francisco's invoices to transfer title, and either keep the unlawful profit or pay all or part thereof to Francisco. The evidence is susceptible of different interpretations and inferences. As to Feigenbaum, it is susceptible of the inference that he alone was to keep any unlawful profit and that his sale was made solely for the purpose of procuring an unlawful profit without any thought or consideration of what others might do. Inferring that Feigenbaum was to keep all such unlawful profit, the entire illegal scheme, as found by this court, must fall to the ground. If Francisco was receiving only a lawful price for its whisky and not participating in any above ceiling profits, the very hub of the wheel is destroyed. If Francisco's only intent was to procure a profit of $2.00 per case with no concern as to what others might do with the whisky, then there is no culpability on the part of Francisco and no general scheme as found by this court.

Merely to supply the means used by another for the perpetration of a crime, without intent to further the perpetration of such crime, is not a criminal offense (See *Direct Sales Co. v. United States;* 319 U.S. 703). The mere supplying of such means, absent an agreement in some form that the purchaser thereof will use it for an unlawful purpose, does not constitute a criminal offense (*United States v. Falcone,* 311 U.S. 205, 210). Mere knowledge that another is to commit a crime does not make one a participant therein. Participation and active cooperation are necessary (*Direct Sales Co. v. United States, supra; U. S. v. Falcone, supra; Eagan v. United States,* 137 Fed.(2d) 369).

Because others used the whisky for the purpose of procuring an unlawful profit cannot charge Feigenbaum with knowledge of such activities or with participation therein. The inference is fully justified that Feigenbaum did not know what any of the other salesmen were doing and did nothing to aid or assist their activities.

To sum up, every logical inference is consistent with Feigenbaum's innocence and non-participation in the criminal scheme as charged. We believe that the only logical and reasonable inference to be drawn from the evidence is that Feigenbaum's activities were individual and independent; that they had no relation to the activities of Abel or Blumenthal or the unidentified salesmen; that Feigenbaum saw an opportunity of making a personal individual profit and that he did so. Beyond this, the record is silent.

This court states that as each salesman knew the lot to be sold was larger, that he thus knew he was aiding in a larger plan. We submit that this lays down a rule allowing the most dangerous inference to be drawn in cases of conspiracy. Assume that any wholesaler has a large amount of goods to sell and that a purchaser procures a small portion thereof and resells in an illegal manner, would this fact justify the conclusion that such purchaser was conspiring with every other person who became a purchaser of the remaining lot? We doubt that such conclusion can logically be drawn. If the seller of the lot actually knew that subsequent illegal sales were to be made and he made the original sales for the purpose of fostering such second sales, then the wholesaler might be guilty. This, however, is entirely different from stating

that each purchaser and reseller became part of a common plan.

CONCLUSION

It is submitted that the decision of this court has laid down new rules for the determination of the sufficiency of evidence in charges of conspiracy and that such rules run counter to prior decisions of this court. This court has now made competent against an individual defendant, evidence of the acts and declarations of alleged co-conspirators for the purpose of proving the existence of the conspiracy and such defendant's connection therewith. The decision of this court now lays down the rule that where evidence on its face is entirely susceptible of a series of inferences consistent with innocence that, nevertheless, a conviction will be upheld if contrary inferences can be drawn from the record. For the foregoing reasons, we believe that a rehearing of this cause should be granted as to petitioner Feigenbaum.

DATED: San Francisco, California, January 10, 1948.

LEO R. FRIEDMAN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
January 10, 1948.

LEO R. FRIEDMAN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

Nos. 54–57.—October Term, 1947.

54	Harry Blumenthal, Petitioner, v. The United States of America.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
55	Lawrence B. Goldsmith, Petitioner, v. The United States of America.	
56	Samuel S. Weiss, Petitioner, v. The United States of America.	
57	Albert Feigenbaum, Petitioner, v. The United States of America.	

[December 22, 1947.]

Mr. Justice Rutledge delivered the opinion of the Court.

The four petitioners and Abel, another defendant, were convicted of conspiring to sell whiskey at prices above the ceiling set by regulations of the Office of Price Administration, in violation of the Emergency Price Control Act. 50 U. S. C. §§ 902 (a), 904 (a) and 925 (b). The charge was made pursuant to the general conspiracy statute, § 37 of the Criminal Code. The convictions were affirmed by the Circuit Court of Appeals, one judge dissenting. 158 F. 2d 883, dissenting opinion at 158 F. 2d 762. Abel has not sought review in this Court. Certiorari was granted as to the other four defendants because we thought important questions were presented concerning the applicability of our recent decision in *Kotteakos* v. *United States*, 328 U. S. 750.

We did not limit our grant of certiorari to that question, however, and on the record it is inseparably connected with the other issues, which relate to the admis-

sibility and sufficiency of the evidence. Accordingly we have considered all of petitioners' contentions. The competent proof was clearly sufficient to show that each petitioner had aided in the whiskey's illegal sale and had conspired with others to do so. The only phase of the case meriting further attention is whether, because of a difference in the state of the proof affecting two groups of defendants, the proof, in variance from the indictment, shows that there was more than one conspiracy.

I.

The indictment charges a single conspiracy in a single count. Ten overt acts are specified. The Government alleged and sought to establish that all of the defendants and other unidentified persons conspired together to dispose of two carloads, each consisting of about 2,000 cases, of Old Mr. Boston Rocking Chair Whiskey at over the ceiling wholesale prices.

This whiskey was shipped by rail from the distiller or his agent to the Francisco Distributing Company, in San Francisco, in December, 1943. Goldsmith was the individual and sole owner of that business and held a wholesale liquor dealer's basic permit as required by federal law. Weiss, his former partner, was sales manager for the business. Feigenbaum operated the Sunset Drugstore in San Francisco. Blumenthal owned and operated the Sportorium, a sporting goods and pawn shop in the same city. Abel either owned or worked in a jewelry store in Vallejo, California. The evidence does not show that any of these last three was connected with Francisco in any way except that each had part in arranging sales and deliveries of portions of these two shipments to purchasers. These were tavern owners in San Francisco and near-by towns such as Vallejo, Santa Rosa, Livermore, Cottonwood and El Cerrito. Proof of the activities of

Feigenbaum, Blumenthal and Abel was made largely by the testimony of the various tavernkeepers with whom they respectively dealt.

The evidence showed that on arrival of the whiskey in San Francisco legal title was taken in Francisco's name, in which the shipping documents were made out; that it honored sight drafts for both shipments, upon Goldsmith's directions to Francisco's bank to pay them out of Francisco's account; that some of the whiskey was delivered *ex car* directly to tavernkeepers who previously had arranged for purchases in lots varying from 25 to 200 cases; that the remainder was placed in storage with the San Francisco Warehouse Company, pursuant to arrangements made by Weiss, and thereafter was delivered by the warehouse to various purchasers holding invoices issued by Francisco [1] on orders given by Weiss. The *ex car* deliveries also were made pursuant to similar invoices and orders.

It further appeared that the cost of the whiskey to Francisco was $21.97 a case,[2] the wholesale ceiling price was $25.27, and Francisco received, by check of the purchasing tavernkeepers, $24.50 for each case sold. There was thus left to it a margin above cost of $2.53 on each case, out of which were to come storage charges, if any, and legitimate net profit.

Thus far no illegal act, transaction, intent or agreement appears. But by the testimony of purchasing tavernkeepers the Government proved that in connection with each sale the purchaser had paid to the selling intermediary, in addition to the $24.50 per case remitted by check to Francisco, an additional sum in cash amount-

[1] Of the more than 4,000 cases received by Francisco, proof concerning disposition at over-ceiling prices related to less than half, or some 1,500-plus cases.

[2] Consisting of $19.24 per case to the distiller, 81¢ for freight, and $1.92 for state taxes.

ing roughly to from $30 to $40 per case. Thus the actual cost to the retailer was from $55 to $65 per case.

In some instances the identity of the person arranging the transaction for the seller and receiving the cash payment was not established or known to the witness testifying to the sale and its details. In others, however, Blumenthal, Feigenbaum or Abel was identified as the salesman or intermediary. It was not brought out with what person or persons Abel, Feigenbaum, Blumenthal or the other salesmen dealt in securing the whiskey from Francisco.[3] In two sales, Figone, a tavernkeeper of El Cerrito, testified he arranged for the purchases in Francisco's offices, but could not identify the person with whom he dealt.

In all instances, however, whether involving sales to San Francisco or to out-of-town dealers and whether through identified or unidentified selling intermediaries, the sales followed the general pattern described above. That is, once the understanding had been reached, the purchaser made out his check at the price of $24.50 per case, to the order of "Francisco Distributing Co.," at the direction of the selling intermediary, to whom the check was delivered; at the same time or later the purchaser also paid in cash to the intermediary the difference between the amount of the check and the agreed over-ceiling purchase price; then or later the purchaser received

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[3] The witnesses identifying Feigenbaum testified they sought him out at the Sunset Drugstore in San Francisco and made the arrangements with him for their purchases there. Similar testimony was given by those identifying Blumenthal with the arrangements taking place in the Sportorium.

In some instances the out-of-town purchasing witnesses testified that they went to San Francisco in search of whiskey to buy and by one means or another, usually through inquiry of persons frequenting bars where the witnesses stopped, were directed to the selling agent. In other instances the intermediary sought out the tavernkeeper as a prospective purchaser at his place of business.

invoices in the name of Francisco for the number of cases of Old Mr. Boston Rocking Chair Whiskey bought, showing only the legal price of $24.50 per case; and thereafter the purchaser received delivery of the whiskey from the warehouse company, by freight in the case of out-of-town buyers. Weiss gave the warehouse company instructions for shipments or local deliveries. Francisco collected the checks by endorsing and sending them through its bank for collection. Slight variations in detail of the pattern appear in some instances but they are insignificant for our purposes.

The foregoing is substantially the evidence used, not only in part to show the conspiracy, but also to connect Blumenthal, Feigenbaum and Abel with it. In addition to the evidence already related as it affects Goldsmith and Weiss, the court received as to them alone the testimony of Harkins, a special investigator for the Alcohol Tax Unit of the Treasury Department. He related conversations had with Goldsmith and Weiss, during which important admissions were made by one or the other or both. Those admissions give rise to the crucial problems in the case.

At the initial conference "early in January," 1944, attended by both Goldsmith and Weiss, the latter "did most of the talking." Questioned concerning who purchased the two carloads and how they were handled, Weiss said "that his firm received $2.00 a case for clearing it through their books." Goldsmith concurred in this and both stated that they divided the $2.00, each taking a dollar. "They both stated, agreed, that they did not sell any of the whiskey. It was sold by others, and they received the check generally for the payment for the whiskey in advance of the date that they had to take up the sight draft bills of lading. At that time they did not tell us who actually sold the whiskey."

Later conferences held separately with Goldsmith and Weiss simply confirmed the substance of the first to

the effect that Francisco was not the actual owner, but that Goldsmith and Weiss were acting for an unidentified person in handling the shipments in Francisco's name.[4] The identity of the owner was not established. But Goldsmith added the admission that he wrote most of the invoices.

Shortly after the trial began the court announced that it would save time and be fairer to all for the evidence to be received initially only as against the particular defendant or defendants to whom it appeared expressly related, reserving to the Government, however, the right to move for its admission as against any or all of the other defendants whenever in the Government's opinion sufficient facts had been introduced to show such defendants to have been connected with the conspiracy charged.

This course was followed. At the close of the Government's case, the court granted its motion to admit all of the evidence as against all of the defendants, except that it declined to allow Harkins' testimony concerning

[4] At an interview with Goldsmith "early in September," Goldsmith was asked "who actually bought him the whiskey, who owned it." In reply "he said that Blumenthal brought it in, and when asked if he knew of his own knowledge, he said, 'No.'" He again stated that Francisco received $2 per case, of which he gave Weiss half.

A still further questioning of Goldsmith took place on September 13. Harkins showed Goldsmith several invoices given to purchasers in the name of Francisco. Goldsmith admitted that he wrote most of the invoices and identified his own handwriting, stating however that a few were written by his bookkeeper.

Harkins testified also regarding a conversation with Weiss on May 14, 1944. In this Weiss stated "it was true that he received half of the $2 commission paid to the Francisco Distributing Company for clearing this whiskey through their books, and he finally refused to answer who actually owned the whiskey. He said 'I don't want to involve myself.'" Weiss also admitted knowing Blumenthal, but "refused to state, to the best of my [the witness'] recollection, positively, whether Mr. Blumenthal was the owner of the whiskey or not."

his conversations with Goldsmith and Weiss to be admitted as against the defendants Blumenthal, Feigenbaum and Abel. That testimony however was allowed to stand against both Goldsmith and Weiss insofar as it related the conversation had in the presence of both, and as to each of them respectively to the extent that the other interviews took place in his presence.

The court overruled numerous objections to these rulings by each defendant. None offered evidence in his own behalf.

Following its rulings on admissibility, the trial court concluded as against various objections that the evidence was sufficient to go to the jury on the issues whether the conspiracy charged had been made out and concerning each defendant's connection with it. Accordingly, it overruled the defendants' motions for directed verdicts and submitted the case to the jury. In the instructions the court expressly stated, in accordance with the previous rulings on admissibility, that Harkins' testimony was to be considered only as against Goldsmith and Weiss, not as against the other three defendants.

II.

In the *Kotteakos* case, *supra*, the Government conceded that, under the charge of a single, all-inclusive conspiracy, the proof showed distinct and separate ones connected only by the fact that one man, Brown, was a participant and key figure in all. But it urged that under the ruling in *Berger* v. *United States*, 295 U. S. 78, the variance was at the most harmless error, a contention we rejected. Here the situation is the reverse. The Government has conceded, in effect, that prejudice has resulted if more than one conspiracy has been proved.[5]

[5] The brief states: "The Government does not contend that if the proof showed several conspiracies, as the dissenting judge thought, the variance would not be prejudicial."

But it insists that the evidence establishes a single conspiracy and no more, an issue not presented or determined in the *Kotteakos* case.

The proof, in relation to whether one or more conspiracies were shown as well as relative to whether any was made out, requires somewhat different treatment concerning the two groups of defendants, Weiss and Goldsmith, on the one hand, and Blumenthal, Feigenbaum and Abel, on the other. This is by reason of the court's exclusion of the admissions of Goldsmith and Weiss from consideration as to the other three defendants.

The Government does not maintain that Francisco, or Goldsmith (or therefore Weiss), was the owner of the whiskey. It accepts the view that another or others unidentified, were the real owner or owners and that Francisco (and thus Goldsmith and Weiss) was merely a channel for distributing the liquor and giving that unlawful process a legal facade. Indeed the "innocent appearing actions" of Weiss and Goldsmith in their use of Francisco, the brief asserts, "were the crux of the conspiracy . . . since the color of legitimacy was an essential part of the plan to dispose of the liquor to tavern owners at over-ceiling prices." [6]

The evidence including the admissions was clearly sufficient to establish that the owner devised a plan which contemplated the entire chain of events from the original purchase in Francisco's name to the ultimate black market sales and deliveries. This includes the obvious inference that he made the arrangements for

[6] The brief also declares that "the gist of the conspiracy . . . was the scheme to sell liquor to tavern owners at over-ceiling prices in an apparently legitimate fashion through the medium of Francisco."

The plan, it is said, "was not merely to sell liquor at over-ceiling prices; it was a plan to sell liquor at over-ceiling prices in an apparently legitimate fashion" and "the core of the scheme was the arrangement by which the whiskey would clear to tavern owners through Francisco, a legitimate wholesaler."

clearance through Francisco's books. Since Goldsmith and Weiss were the owner and sales manager respectively of Francisco and had active parts personally in carrying out those arrangements, there hardly can be any question that they knew the owner, had part in making the arrangements with him and, by virtue of those facts and their parts in facilitating the sales and deliveries to the tavernkeepers, knew also of his intention to resell the whiskey and of his plan for doing so in every material respect except that he intended to sell at over-ceiling prices.

The showing on that crucial question was entirely circumstantial. It was nonetheless substantial. Goldsmith and Weiss knew that there was a margin of only about 77¢ between the legal price ceiling and the $24.50 per case they received by check in payment for the whiskey.[7] They knew that the invoices sent by Francisco to each purchaser gave no room for even that slender margin but represented only the owner's cost figure. They knew further that by using Francisco's name, services and facilities the owner was concealing his identity from the purchasers in the sales, making Francisco appear as the owner on the paper records; that sales were being made to numerous and widely scattered tavernkeepers; and that in every sale remittance was made to them uniformly not only by check, usually of the purchaser, but also in the exact amount of $24.50 per case.

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[7] The $24.50 price was at the most 53¢ above the actual cost of the whiskey, see note 2, plus the $2.00 fee paid Francisco for the use of its books. There is no evidence that the unknown owner received any portion of this 53¢ margin. Since the record shows that Francisco was billed by the warehouse company for the storage of the liquor, the inference was fully justified that the 53¢ margin was largely dissipated by the storage charges and other overhead costs attributable to the sale of the whiskey and that the remaining sum, if any, was retained by Francisco.

The inference that the unknown owner was giving away the liquor is scarcely conceivable. The most likely inferences to be drawn were two, namely, that the owner was selling for a legal margin of not more than 77¢ or that he was selling at over-ceiling prices. The first inference is hardly tenable, especially in view of the prevailing and widespread shortage and demand, with accompanying black market activity, of which the most meticulous wholesale liquor dealer hardly could have been ignorant. The inference was not only justified, it was almost inescapable, that Goldsmith and Weiss knew of the owner's intent and purpose to sell above the lawful price, as well as most of the detail of his plan for doing so. With that knowledge their active aid toward executing his design made them co-conspirators with him, and he with them, toward accomplishing it.

III.

It remains however to consider whether, without the admissions, Blumenthal, Feigenbaum and Abel have been shown to have conspired together and with Goldsmith and Weiss in the scheme proved against the latter two.

The admissions alone disclosed the unknown owner's existence; that Goldsmith and Weiss were acting for him, not for themselves; received from the transactions, and divided equally, the $2 per case; and gave the use of Francisco's name to cover up the unknown owner's existence, identity and part in the scheme.

Whether or not the evidence stripped of those facts was sufficient to sustain the charge, a preliminary question arises upon the trial court's disposition of the admissions. They supplied strong confirmatory or supplementing proof to show, not only the connections of Goldsmith and Weiss with the scheme, but also its existence and illegal character. If therefore it were shown, or even were

doubtful, that the admissions had been improperly received as against Blumenthal, Feigenbaum and Abel, reversal would be required as to them.[8]

But the trial court's rulings, both upon admissibility[9] and in the instructions,[10] leave no room for doubt that the

[8] Even if the evidence were sufficient with the admissions excluded, they were of such importance that if admitted improperly the jury might have drawn entirely different inferences from the whole evidence including them than from it without them.

[9] Before sending the case to the jury the court stated in its presence and for its benefit that it had granted the Government's motion to admit all the evidence against all the defendants except: "That the testimony of the last witness, Mr. Harkins, is admitted in evidence as against the defendant Goldsmith as to the conversation had by the witness with the defendant Goldsmith; that his testimony is admitted as to the defendant Weiss with respect to conversations with the defendant Weiss; and as to both defendants, Goldsmith and Weiss, as to all conversations at which both defendants, Goldsmith and Weiss, were present, and exceptions are noted as to this ruling on behalf of all the defendants separately." The court then added, on inquiry, that counsel was right in taking this to mean that the Harkins testimony "does not affect the defendants Blumenthal and the other two or three."

[10] At three distinct places the court made references either generally and abstractly or expressly applicable to the admissions.

In the first, after stating that the testimony of an accomplice or co-conspirator and oral admissions of a defendant must be received with caution, the court said: "In this case . . . proof of the conspiracy charged . . . must be made independent of admissions of any defendant made after the termination of the alleged conspiracy." At a later point the jury was told: ". . . you must disregard entirely any testimony stricken out by the Court, or any testimony to which an objection has been sustained . . . . *Testimony which has been admitted only to apply as to a specified defendant may only be considered by you as to that defendant and none other.*" (Emphasis added.) And finally near the end of the instructions, expressly referring to the admissions of Goldsmith and Weiss, the court said: "Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the con-

admissions were adequately excluded, insofar as this could be done in a joint trial, from consideration on the question of their guilt. The rulings told the jury plainly to disregard the admissions entirely, in every phase of the case, in determining that question.[11] The direction was a total exclusion, not simply a partial one as the Government's argument seems to imply.[12]

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spirators, and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements.

"*In that connection*, you will recall that I advised you during the trial of the case that the statements made by the defendants Goldsmith and Weiss to the witness Harkins could only be considered by you as against those two named defendants." (Emphasis added.)

[11] It is not entirely clear whether the words "In that connection," italicized in the last paragraph of note 10, refer only to the last or to both of the preceding sentences, in the specific context of the two paragraphs last quoted. But when those statements are taken in conjunction with the earlier ones and with the court's rulings on admissibility made in the jury's presence, we think the total effect of the instructions was to tell the jury plainly to disregard the admissions entirely in considering the guilt of Blumenthal, Feigenbaum and Abel.

This view, though apparently differing from the Government's, see note 12, is reinforced by the further instruction, immediately following the one last quoted in note 10, to the effect that admissions of a conspirator not made in execution of the common design are not evidence against any of the parties other than the one making them. The admissions here fell clearly in that category, some of them because made after termination of the conspiracy, others because they had no effect to forward its object. None were made in furtherance of the conspiracy's object. Cf. *Fiswick* v. *United States*, 329 U. S. 211.

[12] Although we are not sure the argument goes so far, it seems to urge, see note 6 and text, that the admissions, as well as the other evidence expressly affecting only one or some of the defendants, were

The court might have been more emphatic. But we cannot say its unambiguous direction was inadequate. Nor can we assume that the jury misunderstood or disobeyed it.

With the admissions thus entirely excluded, we think nevertheless that the remaining evidence was sufficient to show, in accordance with the charge, that the five defendants joined in a single conspiracy to sell the whiskey at over-ceiling prices in the guise of legal sales. We set forth in the margin the remaining evidence, in part, which justifies this conclusion both as to Goldsmith and Weiss [13] and as to the other three defendants.[14]

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admissible and were received, not merely as against Weiss and Goldsmith on the whole case but also in part as against the other three, that is, to show even as to them the existence and illegal character of the scheme, though not to establish their connections with it. We do not read the record as showing this was the effect of the trial court's ruling.

[13] The evidence as to the unknown owner no longer being in the picture, the inference is almost irresistible that Francisco was the owner. On arrival of the whiskey, title was taken in Francisco's name, in which the shipping documents were made out; sight drafts for the two carloads were paid, at Goldsmith's direction, from Francisco's bank account; and the whiskey was stored and delivered by the warehouse company in accordance with Weiss' directions.

At a time when wholesale liquor distributors were hard put to supply even long-established customers, Francisco sold its liquor, through the medium of salesmen who had no previous connection with the firm and were not regularly engaged in the business of selling liquor, to various tavern owners who had not previously had dealings with Francisco. Moreover, the sales were billed at a price 77¢ per case below the OPA ceiling, despite the fact that tavern owners and other retail distributors considered themselves fortunate to secure whiskey at the full ceiling price. Also of interest are tavern owner Figone's over-ceiling purchases, which followed the pattern of the other sales, except in the important respect that they were made at the Francisco office, but with a person Figone could not identify. See text *supra* following note 3.

We are not prepared to say that the jury was not justified in infer-

Footnotes 13 and 14.—Continued.

ring from this evidence that Goldsmith and Weiss, the guiding hands of Francisco, were willing to make the sales only because of an illegal agreement with the salesmen to receive over-ceiling prices.

The case would stand little better for Goldsmith and Weiss upon an inference that they sold to some other person, who in turn resold to the tavernkeepers through the salesmen. For then the 77¢ legal margin would remain, now for the intervening purchaser, together with the use of Francisco's books and records to conceal his existence and part in the transactions and the allowable inferences from those facts.

[14] Acting almost simultaneously in early December before the first carload arrived in San Francisco, Blumenthal and Feigenbaum, as well as Abel and other unidentified salesmen, made it known that they could obtain whiskey for tavernkeepers. There are compelling indications that these salesmen were kept informed of the status of the whiskey. Thus, on the 8th or 9th of December, Feigenbaum told one purchaser that the whiskey would arrive in San Francisco in "about a week or ten days," that it would come in by railroad, and that there would be "a carload of it." The first of the two carloads of liquor actually arrived on December 17. Similarly, on the 3d or 4th of December, Blumenthal told tavernkeeper Fingerhut that the whiskey would arrive in the latter part of the month. The whiskey did so arrive and the purchaser received delivery. Then, late in December, Fingerhut received a telephone call, which he said was from Blumenthal, asking whether he needed more whiskey. As a result, Fingerhut made an additional purchase on January 3 or 4, 1944. The second carload was received by the warehouse company on or about January 3d.

In addition to being well informed as to the progress of the whiskey in its journey westward, the salesmen followed a singularly set pattern in making their respective sales. All knew and so told the prospective customer that he would receive Francisco's invoice for the whiskey at the same below-ceiling price, which invoice was of great importance because it enabled the tavernkeepers to comply with the record-keeping requirements imposed by the California law. See note 15. All made arrangements for the payment of the identical price of $24.50 per case to Francisco by check. All received the checks, which were delivered to Francisco and collected by it.

Of some significance, in connection with the other evidence, is the

The main difference comes with the elimination of the unknown owner from view, and Francisco's consequent appearance as both actual and legal owner. This changes the detail of the facade, but does not remove either the facade itself or the essence of the unlawful scheme. That still was to sell the whiskey illegally in the guise of legal sales,[15] to the knowledge of each defendant.[16] The gist

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testimony of tavernkeeper Reinburg that on two occasions, at Abel's direction, he drove Abel to San Francisco, dropped him at the Sportorium, Blumenthal's place of business, and picked him up there about a half hour later.

The inference was justified that Blumenthal, Feigenbaum and the other salesmen were aware that their individual sales were part of a larger common enterprise, dependent on the carefully evolved arrangements to give the sales the guise of legitimacy, to dispose of a larger store of liquor. Where a salesman knew, as did Feigenbaum, that at least a carload of whiskey was involved, it was an entirely reasonable inference that he knew that other salesmen, paralleling his efforts, were making sales similar to his. On the basis of the evidence, the jury was well warranted in deciding that the facts dovetailed too neatly to be the result of mere chance.

[15] The evidence showed that some of the purchasers were unwilling to buy liquor without receiving a document to show purchase from a lawfully authorized source as required by state law. With Francisco appearing as actual owner the scheme took on the aspect of one to sell its own whiskey illegally in the guise of lawful sales.

[16] Each salesman knew that he was receiving $30 to $40 above the ceiling; that Francisco was supplying the whiskey; that the elaborate arrangements were made not merely for his sales, but also for others, see note 14; and that he had to have the cash, as well as the check, before delivery from Francisco was completed.

The basis for imputing such knowledge to Goldsmith and Weiss becomes not so compelling as with the admissions included, but nevertheless remains adequate. However the case is viewed, apart from the admissions, they knew the margin of legal profit left, whether for themselves or for others, after deducting the $24.50 per case, was only 77¢. If they actually owned and sold the whiskey, why sell below the ceiling in the face of the shortage and demand, when selling

of the conspiracy lay not in who actually owned the whiskey, but in the agreement to sell it in this unlawful fashion, regardless of who might own it.

With the case thus posited, it is true the salesmen did not know of the unknown owner's existence or part in the plan. And in a hypertechnical aspect the case as a whole might be regarded as showing in one phase an agreement among Goldsmith, Weiss and the unknown owner, X, and in the other an agreement among the five defendants to which X was not a party. Thus in the most meticulous sense it might be regarded as disclosing two agreements, with Goldsmith and Weiss as figures common to both.

Indeed that may be what took place chronologically, for conspiracies involving such elaborate arrangements generally are not born full grown. Rather they mature by successive stages which are necessary to bring in the essential parties. And not all of those joining in the earlier ones make known their participation to others later coming in.

The law does not demand proof of so much. For it is most often true, especially in broad schemes calling for the aid of many persons, that after discovery of enough to show clearly the essence of the scheme and the identity of a number participating, the identity and the fact of participation of others remain undiscovered and undiscoverable. Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction

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costs including the salesmen's compensation still were to be paid? If they did not own or sell at the $24.50 figure, then why the checks and false invoices in that amount? The inference is justified that either they or someone else to their knowledge was receiving more than the lawful price.

of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others.[17] Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity.

Here, apart from the weight which the proof of the unknown owner's existence and participation added to the convictions of Weiss and Goldsmith, it added no essential feature to the charge against the five defendants. The whiskey was the same. The agreements related alike to its disposition. They comprehended illegal sales in the guise of legal ones. Who owned the whiskey was irrelevant to the basic plan and its essential illegality. It was a matter of indifferent detail to the salesmen, as by the same token was the fact that Goldsmith and Weiss were receiving and splitting only the $2 per case. It mattered nothing to the others whether those two received only that amount or the larger illegal sums.

We think that in the special circumstances of this case the two agreements were merely steps in the formation of the larger and ultimate more general conspiracy. In that view it would be a perversion of justice to regard the salesmen's ignorance of the unknown owner's participation as furnishing adequate ground for reversal of their convictions. Nor does anything in the *Kotteakos* decision require this. The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a proj-

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[17] *Marino* v. *United States*, 91 F. 2d 691; *Lefco* v. *United States*, 74 F. 2d 66; *Jezewski* v. *United States*, 13 F. 2d 599; *Allen* v. *United States*, 4 F. 2d 688.

ect; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal.

The case therefore is very different from the facts admitted to exist in the *Kotteakos* case. Apart from the much larger number of agreements there involved, no two of those agreements were tied together as stages in the formation of a larger all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan.

Here the contrary is true. All knew of and joined in the overriding scheme. All intended to aid the owner, whether Francisco or another, to sell the whiskey unlawfully, though the two groups of defendants differed on the proof in knowledge and belief concerning the owner's identity. All by reason of their knowledge of the plan's general scope, if not its exact limits, sought a common end,

to aid in disposing of the whiskey. True, each salesman aided in selling only his part. But he knew the lot to be sold was larger and thus that he was aiding in a larger plan. He thus became a party to it and not merely to the integrating agreement with Weiss and Goldsmith.

We think therefore that in every practical sense the unique facts of this case reveal a single conspiracy of which the several agreements were essential and integral steps, and accordingly that the judgments should be affirmed.

The grave danger in this case, if any, arose not from the trial court's rulings upon admissibility or from its instructions to the jury. As we have said, these were as adequate as might reasonably be required in a joint trial. The danger rested rather in the risk that the jury, in disregard of the court's direction, would transfer, consciously or unconsciously, the effect of the excluded admissions from the case as made against Goldsmith and Weiss across the barrier of the exclusion to the other three defendants.

That danger was real. It is one likely to arise in any conspiracy trial and more likely to occur as the number of persons charged together increases. Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely. It is therefore extremely important that those safeguards be made as impregnable as possible. Here, however, the case as presented involved none of the risks common to mass trials. And, in view of the trial court's caution, the risk of transference of guilt over the border of admissibility was reduced to the minimum. So great was the court's concern that it expressly told the jury, in addition to the instructions set forth above, ". . . the guilt or innocence of each

defendant must be determined by the jury separately. Each defendant has the same right to that kind of consideration on your part as if he were being tried alone."

We have considered petitioners' remaining contentions and find them without merit.[18]

The judgment is

Affirmed.

MR. JUSTICE DOUGLAS concurs in the result.

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[18] These include the argument that petitioners were prosecuted under the wrong statute. Section 4 (a) of the Emergency Price Control Act makes it unlawful, as a misdemeanor, § 205 (b), for any person to sell or deliver any commodity in violation of price regulations, "or to offer, solicit, attempt, *or agree* to do any of the foregoing." (Emphasis added.) Petitioners regard the prohibitory words "or agree," etc., as repeal by implication of the general conspiracy statute, § 37 of the Criminal Code, insofar as otherwise it might apply to the acts forbidden by § 4 (a). There was no "implied repeal." Conviction under the general conspiracy statute requires more than mere agreement, namely, the commission of an overt act. See also *Taub* v. *Bowles*, 149 F. 2d 817; H. Rep. No. 827, 79th Cong., 1st Sess., 7–8.